

February 21, 1992

Mr. Eric Wane Schroeder  
99-902 Moanalua Highway  
Aiea, Hawaii 96701

Dear Mr. Schroeder:

Re: Standards of Conduct of the Department of Corrections

This is in reply to your letter to the Office of Information Practices ("OIP") dated December 22, 1991 requesting an advisory opinion concerning your right to inspect and copy the "Standards of Conduct of the Department of Corrections."

**ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Department of Public Safety ("PSD") must make available for public inspection and copying a government record entitled "Standards of Conduct of the Department of Corrections."

**BRIEF ANSWER**

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), we examined whether the PSD's Policies and Procedures Manual must be made available for inspection and copying under the UIPA. In that opinion, we stated our belief that under the UIPA, each PSD policy or procedure must be publicly accessible, unless such policy or procedure is: (1) "predominantly internal," i.e. directed at staff and does not affect a member of the public, and 2) its disclosure would significantly risk the circumvention of PSD regulations, prison security policies or measures for the control of inmates.

Using the two tests set forth in the above opinion letter,

in OIP Opinion Letter No. 91-3 (March 22, 1991), we concluded that the Honolulu Police Department's Standards of Conduct must be made available for public inspection and copying under the UIPA. After examining those standards, we concluded that their disclosure would not significantly risk the circumvention of agency statutes or regulations, or impede the police department's law enforcement efforts.

Based upon our examination of the PSD's Standards of Conduct, and based upon previous OIP advisory opinions and legal authorities cited therein, we conclude that disclosure of the PSD's Standards of Conduct will not significantly risk the circumvention of agency statutes or regulations, prison security policies, or measures for the control of inmates. Therefore, we conclude that the PSD's Standards of Conduct is not a government record that by its nature "must remain confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1991). Thus, we conclude that the PSD's Standards of Conduct must be made available for inspection and copying "upon request by any person." Haw. Rev. Stat. . 92F-11(a) and (b) (Supp. 1991).

### **FACTS**

By letter to the OIP dated December 22, 1991, you requested an advisory opinion concerning your right to inspect and copy a government record maintained by the PSD entitled "Standards of Conduct of the Department of Corrections."<sup>1</sup>

Attached to your letter was a memorandum from the PSD dated November 13, 1991. This memorandum was signed by Mr. Eric Penarosa, Deputy Director for Corrections, and states:

Effective this date, the Department Standards of Conduct for Corrections, dated August 1988, shall be classified as CONFIDENTIAL. Inmates and the general public shall not be permitted to access these Standards. The basis for confidentiality is that inmate access to these standards could frustrate facility operations and affect the good management and control of the correctional facility.

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<sup>1</sup>The Standards of Conduct are dated August 1988. After their publication, and by an act of the Legislature, the functions of the Department of Corrections were taken over by a newly created Department of Public Safety. However, the PSD's Standards have not been amended to reflect this organizational change.

In your letter to the OIP, you stated that before the issuance of the PSD's memorandum dated November 13 1991, copies of the PSD's Standards of Conduct were readily available to inmates in State correctional facilities. In addition, by letter dated January 22, 1992 to the OIP, you provided letters from corrections agencies in Illinois, California, and Washington, all indicating that their agencies' standards of conduct are accessible to inmates, the public, and correctional employees.

At the request of the OIP, the PSD provided the OIP with a copy of its Standards of Conduct for its review in the preparation of this opinion letter.

### DISCUSSION

The UIPA, the State's open records law, generally provides that "[a]ll government records are available for public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1991). More specifically, section 92F-11(b), Hawaii Revised Statutes, states "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for public inspection and copying during regular business hours." (Emphasis added.)

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), we examined whether, under the UIPA, the PSD Policies and Procedures Manual must be made available for inspection and copying by inmates. Based upon the express definition of the term "person" set forth at section 92F-3, Hawaii Revised Statutes, and authorities interpreting state and federal open records laws similar to the UIPA, we concluded in OIP Opinion Letter No. 90-34 that inmates in State correctional facilities have the same UIPA rights of access as members of the public or any other "person." See OIP Op. Ltr. No. 90-34 at 3-4.

Accordingly, we now turn to an examination of whether the PSD's Standards of Conduct are protected from disclosure by one of the UIPA's exceptions to required agency disclosure, set forth in section 92F-13, Hawaii Revised Statutes.

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), based upon court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. . 552(b)(2) (1988) ("FOIA"), we concluded that under the UIPA's "frustration of a legitimate government function" exception, section 92F-13(3), Hawaii Revised Statutes, agencies may withhold public access to any agency policy or procedure that is not a "rule," and that meets the following criteria:

- 1) The policy or procedure is predominantly internal (i.e., directed at staff and does not purport either to regulate activities among members of the public or to set standards to be followed by agency personnel in deciding to proceed against or take action against a member of the public);  
and
- 2) The disclosure of the policy or procedure would significantly risk circumvention of agency regulations or statutes.

OIP Op. Ltr. No. 90-34 at 8, citing Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981).<sup>2</sup>

Applying the above tests to the PSD's policy and procedure manual, in OIP Opinion Letter No. 90-34, we concluded that the PSD may withhold access to those policies and procedures that would significantly risk the circumvention of prison policies concerning the security of prisons or the control of inmates.

Likewise, in OIP Opinion Letter No. 91-3 (March 22, 1991), we examined whether the Honolulu Police Department's Standards of Conduct must be made available for public inspection and copying under the UIPA. In this opinion we also applied the two part test set forth above. We also examined a federal court decision holding that under FOIA's Exemption 2, the Federal Bureau of Investigation's Standards of Conduct were not protected from disclosure. See OIP Op. Ltr. No. 91-3 at 6-7. Accordingly, we concluded that under the UIPA, the Honolulu Police Department must make its Standards of Conduct available for public inspection and copying, because disclosure of the standards would not significantly risk circumvention of agency regulations or statutes, or significantly impede the police department's enforcement efforts.

We have thoroughly examined a copy of the PSD's Standards of Conduct. We find no basis to distinguish its contents from the standards examined by the OIP in OIP Opinion Letter No. 91-3. Consistent with our previous opinion letters, it is

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<sup>2</sup>As explained by the court in the Crooker case, the rationale for the protection of policies that meet both of the stated tests is to protect from disclosure those policies that would allow persons "simultaneously to violate the law and to avoid detection" and thereby impede law enforcement efforts.

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our opinion that disclosure of the PSD's Standards of Conduct will not significantly risk the circumvention of prison regulations, prison security policies, or measures for the control of inmates. Thus, for the foregoing reasons, we conclude that the PSD's Standards of Conduct are not protected from disclosure by the UIPA's "frustration of legitimate government function" exception.

Therefore, it is our opinion that under the UIPA, the PSD's Standards of Conduct must be made available for public inspection and copying during regular business hours upon request by any person.

### CONCLUSION

Having thoroughly examined the PSD's Standards of Conduct, it is our opinion that they are similar to the standards of conduct examined in OIP Opinion Letter No. 91-3, and that disclosure of this government record will not result in the frustration of a legitimate government function. Accordingly, we conclude that under the UIPA, the PSD's Standards of Conduct must be made available for public inspection and copying.

Very truly yours,

Hugh R. Jones  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

HRJ:sc

c: The Honorable George Sumner  
Director of Public Safety

Mr. Eric Penarosa  
Deputy Director for Corrections